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Supreme Court of the United States

October Term, 1978

No. 78-1679

CANAL BARGE COMPANY, INC.,
Petitioner,

vs.

PPG INDUSTRIES, INC. and
ASHLAND OIL COMPANY—
THOMAS PETROLEUM TRANSIT DIVISION,
Respondents.

RESPONDENT PPG'S BRIEF *RE:* PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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REASONS FOR DENYING THE WRIT

PPG respectfully submits that there are no matters involved in this case which warrant this Court's exercising its discretion to review Canal's Writ of Certiorari.

I. This case involves no principle of national uniformity regarding the interpretation and enforcement of maritime law.

Supreme Court Rule 19 states, *inter alia*, that this Court will consider decisional conflicts between circuit courts of appeal

as one of the bases for review of writs of certiorari. 28 U.S.C. Rule 19. Canal does not assert that such a conflict exists in this case. Rather, Canal cites the disagreement of two judges of the Third Circuit Court of Appeals as a reason for reviewing the Writ. The fact that two members of the Third Circuit Court disagree with a holding concurred in by the remaining members of the Court is not a reason to review the Writ.

Canal further states that the Third Circuit Court "approved a major change in the law with respect to the rights and obligations of shippers and carriers regarding damages to goods". On the contrary, the Third Circuit Court neither changed the law nor "misapprehended existing case law and statutory law".

Under existing case law, Canal had a continuing obligation throughout the entire voyage to exercise due diligence in the handling, care and delivery of the cargo. *May v. Hamburg*, 290 U.S. 333 (1933); *The Willdomino v. Citro Chemical Co.*, 300 F. 5 (3rd Cir. 1924), *aff'd*, 272 U.S. 718 (1927). Canal has cited no case holding that damage to the container from an excepted cause thereafter excuses the carrier from exercising due diligence in the handling, care and delivery of the cargo therein.

Likewise, under the Harter Act, Canal as a carrier was responsible for "damage arising from negligence, fault, or failure in . . . custody, care or proper delivery of . . . property . . . committed to its . . . charge". 46 U.S.C. § 190. Canal has cited no statute relieving it of this obligation to properly care for and deliver the cargo.

These statutory and case law obligations were complimentary to the contractual obligations which Canal assumed under the Towing Contract, *i.e.*, to exercise "reasonable care in the . . . handling, care and delivery of the cargo . . ." (R. 53a).

Therefore, the Third Circuit Court did not impose any "responsibility on [Canal] heretofore unknown in the law". The Third Circuit Court applied well-settled case and statutory law consistent with Canal's contractual obligations and with the maritime law imposing burdens of proof and reparation on Canal as the party responsible for the loss. No principle of national uniformity is present in this case.

II. The only contract to which Canal was a party and beneficiary did not require PPG's obtaining cargo insurance with waiver of subrogation. The Third Circuit Court's discussion of the *Bisso* case and its progeny was *dictum*. In any event, there is no conflict in the decisions of the circuit courts of appeals.

Contrary to Canal's argument, there are no maritime insurance issues involved in this case. The Third Circuit Court held that "the insurance clause in the transportation agreement [did not extend] to anyone other than Ashland". *PPG Industries, Inc. v. Ashland Oil Co., et al.*, 592 F.2d 138, 145 (3rd Cir. 1978). There was no contractual relationship between PPG and Canal; Canal's only contractual relationship was with Ashland, as set forth in the Towing Contract. Since Canal's own Towing Contract contained no requirement for cargo insurance, Canal attempts to rely on the Transportation Agreement betwwen PPG and Ashland. The Third Circuit Court in a prior decision in this case held that Canal was not a beneficiary of the Transportation Agreement. *PPG Industries, Inc. v. Ashland Oil Co., et al.*, 527 F.2d 502 (3rd Cir. 1975). Such decision is *res judicata* to the issue of whether Canal is entitled to assert rights under the Transportation Agreement. Thus, the discussion of the Third Circuit Court on this issue was *dictum* and there is no issue which warrants review by this Court.

In any event, the Fifth Circuit Court's decisions do not aid Canal's cause. The holdings of cases of the *Twenty Grand Offshore, Inc. v. West India Carriers, Inc.*, 429 F.2d 679 (5th Cir. 1974), *Fluor Western, Inc. v. G & H Offshore Towing Co.*, 447 F.2d 35 (5th Cir. 1971) and *BASF Wyandotte Corp. v. Tug Leander, Jr.*, 590 F.2d 96 (5th Cir. 1979) are all based upon the fact the parties involved in each case bargained for the inclusion of exculpatory provisions in their respective contracts. In this case, PPG had no knowledge of Canal's participation in the towage until after the voyage ended and hence had no negotiations with Canal. On the other hand, in its Towing Contract, Canal bargained for and obtained an exculpatory insurance provision covering equipment only. Obviously, Canal chose to predicate any liability for cargo damage on its failure to exercise due diligence and reasonable care "in the receipt, stowage, handling, care and delivery of the cargo" (R. 53a) and presumably charged a correspondingly higher towage rate. In reality, Canal is asking this Court to rewrite rather than to enforce its Towing Agreement. Since Canal admittedly did not bargain for cargo insurance with waiver of subrogation, the decisions of the Fifth Circuit Court are not applicable to or in conflict with the Third Circuit Court's decision in this case. Thus, there is no conflict between the circuit courts with respect to any issue involved in this case.

III. (A) The Third Circuit Court's opinion imposed the burden of proof in conformity with settled legal principles. In any event, the judgment was based upon jury findings of fact and not legal presumptions.

The fallacy in Canal's argument is its assertion that the Third Circuit Court required Canal to prove "the cargo damage resulted from an excepted cause *and* the exercise of due diligence to avoid the damage caused by the described

hazard". *Petition for Writ of Certiorari* 10. It should be noted that the only damage caused by the "described hazard" was to the barge and the jury so found.

Since the cargo arrived in damaged condition after originally having been received in good condition, Canal had the burden of showing the damage to the cargo was occasioned by an excepted cause. Canal contends this burden was satisfied by the jury's determination "that an excepted peril, an obstruction to navigation, was the occasion for the damages". *Petition for Writ of Certiorari* 11. However, the jury actually found that (a) the "excepted peril" damage was only to the barge and (b) the damage to the cargo arose from Canal's failure to care for the cargo during the subsequent five-day, 400 mile voyage. The jury finding was not based upon a legal presumption but on Canal's failure to observe minimal maritime standards of care in caring for the cargo, as enunciated by Canal's own expert (R. 475a-476a). The jury finding was consistent with Canal's legal duty to mitigate damage to the cargo. *The Willdomino v. Citro Chemical Co., supra.*

Canal never presented any evidence that the damage to the cargo came from an excepted cause or that Canal was free of negligence in that regard; in fact, its own evidence proved that the cargo damage came from its failure to care for the cargo. Neither the District Court nor the Third Circuit Court imposed a burden of proof upon Canal to show damage to the cargo from a peril of the sea, as well as its own freedom from negligence in connection therewith.

The gravamen of Canal's legal position is that, once it proved the damage to the *barge* came from an excepted cause, Canal was excused from showing it exercised diligence in the care of the *cargo* during the subsequent voyage. Such a position is not only contrary to the evidence, the case law (as

enunciated in the case of *Clark v. Barnwell*, 53 U.S. 272 (1851)), the statutory law (as contained in the Harter Act) and Canal's contractual obligations (as set forth in the Towing Contract), but is contrary to the public policy of imposing burdens of proof and persuasion on the carrier who had exclusive custody and control of the cargo and the only knowledge of what happened during the voyage.

The opinion of the Third Circuit Court does not affect "the delicate balance drawn between competing interests of the shippers and carriers"; it is a reaffirmation of the principles which maintain that balance.

(B) Whether or not the barge should have been of double-skin construction does not affect PPG's right to recover since PPG made no warranty of seaworthiness. In any event, the issue of seaworthiness did not present a jury question.

The issue of seaworthiness of the barge involves rights and obligations *inter se* Ashland and Canal only and does not involve PPG or its right to recover. Only Ashland as the owner of the barge made a warranty of seaworthiness. Transportation Agreement; Towing Contract; 46 U.S.C.A. § 192.

In any event, the issue was properly not submitted to the jury for a number of reasons.

Canal's marine superintendent testified that a barge of single-skin construction would be seaworthy for transporting "water soluble cargos such as ethylene glycol" (R. 741a). Canal's maritime expert witness testified that it was safe to transport water soluble cargo such as ethylene glycol in single-skin barges (R. 457a-458a). Thus, Canal's own evidence established that the barge was seaworthy and, accordingly, there was no factual issue to submit to the jury.

The Towing Contract gave Canal the absolute "right, without liability therefor, to terminate the voyage and/or tie off the [barge] at any point should the equipment become unfit to tow" (R. 53a). Even though Canal knew of the barge's single-skin construction nine days before the topping incident (R. 225a, 304a), it failed to take the remedial action available to it. Thus, as a matter of law, Canal waived any defense concerning and assumed any risk arising out of the barge's alleged unseaworthiness.

The testimony of Canal's maritime expert as to the need for double-skin construction had no probative value. The jury found that the barge damage was caused by the barge's rubbing the bottom of the channel and rejected the expert's theory that the damage was caused by a submerged object "with some buoyancy or give to it" (R. 403a). Thus, the hazard which double-skin construction was allegedly designed to survive was not involved in this case.

Conclusion

Neither the record nor the law supports the contentions set forth in Canal's Petition.

The maritime insurance provisions are not an issue in this case simply because Canal was not a party to or a beneficiary under the Transportation Agreement. In addition, there is no conflict between circuit courts concerning the effect of maritime insurance provisions in cases involving similar facts. The fact that two judges on the Third Circuit panel disagree with the majority is of no significance. Canal's contention is that the "excepted cause" damage to the barge excused its subsequent obligations of diligence and care toward the cargo. Such a proposition is not presently the law and should not be the law. Canal's attempt to reach this result by

allocating burdens of proof is not relevant, for the jury specifically found that the "excepted cause" damage to the barge was antecedent to and separate and distinct from the damage to the cargo.

The issue of seaworthiness was properly not submitted to the jury because (a) Canal's evidence established that the barge was seaworthy and (b) Canal waived its right to assert such a defense.

The issues involved in this case are pedestrian in nature and were properly resolved in accordance with the evidence and established legal principles. Canal attempts to raise the *dictum* of the Third Circuit Court's decision to the level of significant maritime matters which are not supported by the record or the law.

Accordingly, it is respectfully submitted that Canal's Petition should be denied.

Respectfully submitted,

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